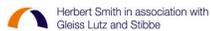


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Legal standing of shareholders in international law

Matthew Weiniger Partner Herbert Smith LLP
6 May 2011



What is the issue?

Substantial divide between how shareholder claims are treated in customary international law and in investment treaty jurisprudence

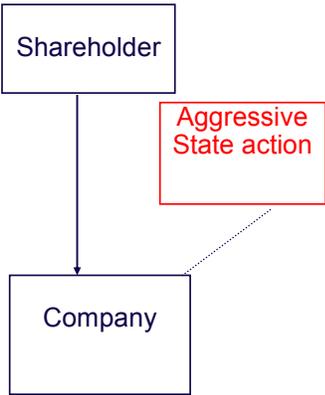
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What is the issue? (2)



ICJ in *Barcelona Traction/Diallo* says that shareholder cannot bring claim

BIT tribunals consistently say it can

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Belgium v Spain (Barcelona Traction) ICJ 1970

Belgian shareholders in Canadian company with investment in Spain. After Spanish courts/ authorities seized assets, Belgium sought to assert right to espouse diplomatic protection on behalf of shareholders.

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Barcelona Traction Held (1):

"In this field international law is called upon to recognize institutions of municipal law that have an important and extensive role in the international field. This does not necessarily imply drawing any analogy between its own institutions and those of municipal law, nor does it amount to making rules of international law dependent upon categories of municipal law. All it means is that international law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction."

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Barcelona Traction Held (2)

"Notwithstanding the separate corporate personality, a wrong done to the company frequently causes prejudice to its shareholders. But the mere fact that damage is sustained by both company and shareholder does not imply that both are entitled to claim compensation. Thus no legal conclusion can be drawn from the fact that the same event caused damage simultaneously affecting several natural or juristic persons. Creditors do not have any right to claim compensation from a person who, by wronging their debtor, causes them loss. **In such cases, no doubt, the interests of the aggrieved are affected, but not their rights.** Thus whenever a shareholder's interests are harmed by an act done to the company, it is to the latter that he must look to institute appropriate action; for although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed."

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In addition:

- No lifting the veil
- No genuine connection test (therefore differs from individuals)
- No room for considerations of equity

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Guinea v Congo (Diallo) ICJ 2010

Guinea citizen doing business in Congo through Congo companies he controlled. Arrested, expelled and unable to recover debts owed to his companies.

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What can the shareholder claim for?

- Right to take part and vote in shareholder meetings
- Right to appoint management
- Right to monitor

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BUT NOT:

- Property rights arising from shares:

" The Court observes that international law has repeatedly acknowledged the principle of domestic law that a company has a legal personality distinct from that of its shareholders. This remains true even in the case of an SPRL which may have become unipersonal in the present case.

Therefore, the rights and assets of a company must be distinguished from the rights and assets of an *associé*. In this respect, it is legally untenable to consider, as Guinea argues, that the property of the corporation merges with the property of the shareholder. Furthermore, it must be recognized that the liabilities of the company are not the liabilities of the shareholder. In the case of Africontainers-Zaire, as an SPRL, it is specifically indicated in its Articles of Incorporation that the "liability of each *associé* in respect of corporate obligations shall be limited to the amount of his/her *parts sociales* in the company."

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Compare with BIT position

CMS v Argentina Decision on Jurisdiction (2003) (USA/ Argentina BIT)

CMS was a minority shareholder in Argentinean company TGN. TGN had contract with the Government giving it the right to transport gas. Conversion of contract sums from US dollars to pesos affected value of CMS investment – could CMS claim?

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If CMS is allowed to bring a claim:

- CMS does not hold the contractual rights upon which claim is based
- CMS would have different (and better!) rights than holder of rights
- Holder of rights could compromise claim for zero but still CMS would have a claim

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Conclusion:

"The Tribunal therefore finds no bar in current international law to the concept of allowing claims by shareholders independently from those of the corporation concerned, not even if those shareholders are minority or non-controlling shareholders. Although it is true, as argued by the Republic of Argentina, that this is mostly the result of *lex specialis* and specific treaty arrangements that have so allowed, the fact is that *lex specialis* in this respect is so prevalent that it can now be considered the general rule, certainly in respect of foreign investments and increasingly in respect of other matters. ²⁹ To the extent that customary international law or generally the traditional law of international claims might have followed a different approach — a proposition that is open to debate — then that approach can be considered the exception."

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Also note:

- All investment treaty tribunals and annulment committees support the CMS conclusion
- *Barcelona Traction* is distinguished as relating to espousal of diplomatic protection (*LC&E, Azurix, GAMI*)
- Door is open to shareholder claims once treaty defines shares as an investment: (*Genin, Siemens, Lanco, Cammuzi*)

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